

FISCAL NOTE

Bill #: HB0794

Title: Create criminal and civil penalties for violations of the right to know

Primary Sponsor: Gallik, D

Status: As Introduced

Sponsor signature

Date

David Ewer, Budget Director

Date

Fiscal Summary

	<u>FY 2006 Difference</u>	<u>FY 2007 Difference</u>
Expenditures:		
General Fund	Unknown	Unknown
Revenue:		
General Fund	\$0	\$0
Net Impact on General Fund Balance:	Unknown	Unknown

- | | |
|---|--|
| <input type="checkbox"/> Significant Local Gov. Impact | <input type="checkbox"/> Technical Concerns |
| <input type="checkbox"/> Included in the Executive Budget | <input type="checkbox"/> Significant Long-Term Impacts |
| <input type="checkbox"/> Dedicated Revenue Form Attached | <input type="checkbox"/> Needs to be included in HB 2 |

Fiscal Analysis

ASSUMPTIONS:

State Agencies

1. By amending section 2-3-221, MCA, to require costs and attorney fees to a prevailing plaintiff in actions under Article II, § 8 of the constitution, which governs the right of public participation, state agencies will be required to pay costs and fees in some cases in which they are not payable under current law. Currently, 2-3-221, MCA, makes the award of costs and attorney fees is discretionary. The number of such cases and the amount of such costs and fees cannot be predicted but may be significant.
2. By amending section 2-3-221, MCA, to make an award of costs and attorney fees to a prevailing plaintiff in actions under Article II, § 9 of the constitution mandatory, state agencies will be required to pay costs and fees in some cases in which they are not payable under current law. The number of such cases and the amount of such costs and fees cannot be predicted but may be significant.
3. The bill will induce state agencies to produce documents in situations in which persons mentioned in the documents will seek to protect a right of privacy or to prevent production based upon a specific privilege or for other reasons. The bill does not prohibit defense or indemnification of such their party claims arising from a request for documents. State agencies will be required to defend and indemnify in cases involving these third party claims even if they cannot defend or indemnify with respect to the claim of the

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requesting party. The number of such third party claims and the cost of defending them cannot be predicted, but may be significant.

4. The severe penalties for incorrect judgments by “records custodians” will inhibit recruitment and retention of persons to fill such positions, requiring expenditure of additional state resources for recruitment and training. The amount of such expenditures cannot be predicted but may be significant.
5. State agencies may also incur significant additional legal expenses related to the determination of whether to release records or not. These costs are unknown.

TECHNICAL NOTES:

1. It is unclear whether the bill intends to create one criminal offense or two when a state employee makes an incorrect judgment in responding to a request for a document. Section 3 of the bill states that a person who knowingly withholds a public document “is guilty of a violation of” sections 1 through 4 of the bill “and, upon conviction, shall be punished as set forth in [section 4] and 45-7-401.” The elements of a violation of section 3 of the bill and 45-7-401, MCA, as amended by the bill, are different. Section 3 applies only to the conduct of a “records custodian,” a term defined in the bill as a “public officer” as defined in 2-2-102, MCA. Mont. Code Ann. § 2-2-102 limits the term “public officer” to statewide elected officials, department heads, and any elected local government officer. The scope of 45-7-401, MCA, as amended by the bill, is much broader. Mont. Code Ann. § 45-7-401, as amended by the bill, can be read to make it a violation for any “public servant” to withhold a public document in violation of sections 1 through 4 of the bill. “Public servant” as defined in Mont. Code Ann. § 45-2-101(63), which is the definition that applies under 45-7-401, MCA, includes any “officer or employee of government, including but not limited to legislators, judges, and firefighters, and a person participating as a juror, adviser, consultant, guardian, or court-appointed fiduciary.” The bill does not clearly provide whether the restricted definition in section 2 of the bill or the expansive one in 45-2-101(63), MCA, applies to a prosecution under 45-7-401, MCA, as amended by the bill. In the event of a prosecution, this lack of clarity would certainly be the subject of litigation.
2. Section 4 of the bill does not state to whom the “damages” are to be paid. The constitutionality of a provision requiring payment of ordinary damages by a defendant that do not reflect the value, as computed according to a legal standard of proof of an actual injury suffered by the person to whom the damages are paid, has not been tested. This provision would certainly be the subject of litigation if ever enforced.
3. The amendment to 2-9-305, MCA, prohibiting defense and indemnification of state employees under this bill is intended to remove important protections designed to ensure that state employees may do their jobs without intimidation and fear of ruinous litigation costs payable from their own assets.
4. Section 4(2) of the bill and the amendment to 2-9-305, MCA, regarding defense costs is unworkable. Section 4(2) provides that “If a records custodian has violated the public’s right to know, then the records custodian is considered to have acted outside the course and scope of the records custodian’s employment and may not be defended or indemnified by the government, the employer, or its insurers for any money judgment or legal expenses, including attorney fees. . .” As amended, 2-9-305(6), MCA, would deprive the employee of defense and indemnification only after “a judicial determination is made that . . .” the employee’s conduct violated the requirement of the bill. Initially, it is unclear whether “the public’s right to know” under section 4(2) refers to the right defined under Article II, § 9 of the constitution or the broader right defined in the bill. More importantly, once it has been shown that the “records custodian has violated the public’s right to know” as provided in section 4(2) or the judicial determination referred to in 2-9-305(6), MCA, has been made, the defense will already have been provided and the legal costs and attorney fees already incurred, leaving the agency with the unenviable, and probably ultimately fruitless, chore of suing its employee yet again to recoup the costs of the defense.

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5. Department directors and elected officials will have to determine whether they can still delegate right-to-know decisions. These decision are part of many levels of workers daily job. Directors may want to review every decision to protect themselves which can alter their ability to run their agencies. Directors may also be responsible for right-to-know decisions of “attached to” agencies but not have the statutory authority to direct their actions.
6. The definition of “withholds,” as in “purposely or knowingly withholds those public documents,” is unclear. Would failure to make copies free of charge be withholding? Would failure to give out the electronic drafts of documents in hard copy be withholding? Some requests require time to compile the information. Would failure to immediately comply with the request, due to the volume of material or internal discussions as to whether disclosure is appropriate, be withholding?

Department of Justice

7. Section 2(1)(c) of the bill creates a new definition of “public document” that would foreclose any contentions regarding confidentiality of documents not based on a right of individual privacy. The State of Montana currently engages in numerous joint law enforcement efforts with other states that provide important protection for Montana consumers. These efforts always involve the sharing of law enforcement information between the states that is confidential under the laws of other states. Neither the Montana Supreme Court nor any other Montana court has yet ruled on whether Article II, Section 9 of the Montana constitution requires these cooperating states to forfeit their claims to the confidentiality of their own investigative work product if they share it with state officials in Montana. The willingness of other states to cooperate with Montana in these efforts is dependant on our ability to ensure the confidentiality of documents. Passage of the bill will impair Montana’s efforts to participate in these important multi-state consumer protection efforts.
8. The new definition of “public document” in section 2(1)(c) significantly changes existing law and would in effect overrule Supreme Court decisions allowing maintenance of confidential criminal justice information and preservation of the confidentiality of trade secret information. Requiring production of confidential criminal investigative files on demand would inhibit law enforcement activities and could threaten public safety. Requiring production of trade secret information could subject the State to liability for uncompensated taking of private property.

Department of Corrections

9. The department has documents including juvenile records, medical records, personnel files, and security plans that are not currently available to the public. The potential release of documents such as security policies and plans could cause a security risk or threat to public safety.